No. 277.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

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LOUISA BANHOLZER, PLAINTIFF IN ERROR,

vs.

THE NEW YORK LIFE INSURANCE COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief for Defendant in Error.

GEO. C. SQUIRES,
F. W. M. CUTCHEON,
Counsel for Defendant in Error.

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Brief for Defendant in Error.

Statement of Facts.

The New York Life Insurance Company, defendant in error, on September 16, 1895, issued its policy of insurance on the life of William Banholzer for $20,000, payable to him in twenty years from that date, or in case of his prior death, to Louisa Banholzer, the plaintiff in error. Banholzer was to pay a premium of $1146 in advance and a like sum on September 16th of each year thereafter until twenty full years' premiums had been paid. (*Record p. 35.*)

The policy contained the following provisions:

"If any premium is not paid on or before the day when due, this policy shall become void, and all payments previously made shall remain the property of the company, except as hereinafter provided."

"A grace of one month will be allowed in payment of subsequent premiums after this policy shall have been in force three months, subject to an interest charge at the rate of five per cent. per annum for the number of days during which the premium remains due and unpaid. During the month of grace this policy remains in force, the unpaid premium, with interest, as above, remains an indebtedness to the company, which will be deducted from the amount payable under this policy if the death of the insured shall occur during the month." (*Record p. 37.*)

Banholzer paid the first premium, but when the second premium became due, and within the one month's grace which was allowed for its payment, Banholzer paid $286 in cash, and for the remainder gave his note, as follows:

"St. Paul, Minn., 9–16, 1896.

Without grace, six months after date, I promise to pay to the order of the New York Life Insurance Company, eight hundred and sixty dollars, at Second National Bank, St. Paul, Minn. Value received, with interest at the rate of five per cent. per annum.

This note is given in part payment of the premium due 9–16–96, on the above policy, with the understanding that all claims to further insurance and all benefits whatever which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself. (Signed) Willliam Banholzer." (*Record, p. 39.*)

At the same time with the making of the above note, and as a part of the same transaction, the Insurance Company gave Banholzer a receipt as follows:

"St. Paul, Minn., 10–6–96.

Note six months, after date 9–16–96, due 3–16–97, without grace, made by William Banholzer, payable at Second National Bank, St. Paul, Minn. Received from the owner of policy No. 692,465, $286 in cash, and his note at six months for $860, which continues said policy in force until the 16th day of September, 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity, and this receipt signed by

J. A. Campbell, Cashier." (*Record, p. 39.*)

When this note matured on March 16, 1897, it was surrendered to Banholzer, who then paid $241.50 in cash, and made a new note for $639 with terms exactly similar to the first note, excepting that it was payable in sixty days from its date (*Record, p. 46*). This latter note was never paid.

On May 28, 1897, Banholzer was taken with a fever which continued from that time, with delirious intervals, until he died on July 5, 1897 (*Record, pp. 32, 33*).

On May 28, 1897, and about two hours after Banholzer had taken to his bed, he received a letter from the Insurance Company, as follows:

"New York Life Insurance Company, 346-348 Broadway.

Mr. Wm. Banholzer, New York, May 26, '97.
690 Stewart St., St. Paul, Minn.

Dear Sir:—We have received a report from our branch office returning unpaid the note which was given by you to meet the payment of the overdue premium on your policy No. 692,465.

We regret very much that you did not see your way to meet this note at its maturity, as we are certain that nothing short of an apparent necessity or some misapprehension of fact would compel you to give up your insurance with our company. You are no doubt aware that no other company issues policies which are more liberal in their conditions, or more satisfactory in their results, and we believe it would be very much against your own interests should you fail to do everything in your power to put this policy in force again.

Being a mutual company, we are anxious to do everything possible for the good of the policy holders, and if you will let us know just how much cash you can pay at present we shall take your case under consideration, and you can rest assured that, if it is at all possible to reinstate you on easy terms, we shall have the company do so. Any communication you make will be treated with the utmost confidence, and we will look for an early reply in the enclosed stamped envelope.

Very truly yours,
Geo. W. Perkins,
3rd Vice President." (*Record, pp. 33, 39.*)

On June, 18, 1897, Banholzer, through Woodruff, his attorney, sent a draft for $690, being the amount of the note of March 16, 1897, with interest, to the home office of the Insurance Company. This draft was returned with the following letter:

"New York Life Insurance Company, 346-348 Broadway.

Mr. F. G. B. Woodruff,
88 Court Block, St. Paul, Minn.

Dear Sir:—We acknowledge receipt of your letter of the 18th inst. enclosing draft of the Second National Bank of St. Paul, Minn., for $690 on the Western National Bank of New York City, which draft you tender in settlement of the unpaid note of $639, and interest, which note was due May 16th, 1897, accepted in part settlement of the premium due Sept. 16th, 1896, on policy No. 692,465—Banholzer. As policy No. 692,465—Banholzer—stands lapsed on the books of the company for non-payment of the note described above, we return herewith the draft forwarded in your letter of above date. We shall thank you for an acknowledgment of this enclosure. When writing please refer to this letter by file number. Very respectfully,

Hugh S. Thompson,
Comptroller." (*Record, p. 40.*)

Banholzer's application for the policy, which was signed by him, provides that the contract of insurance should be construed according to the laws of the State of New York. (*Record, p. 26*).

At the time of the execution of the policy, there was in force a statute of the State of New York, providing as follows:

"No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or installment or of any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest or installment or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest or installment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium, by or before the date it falls due, the policy and all payments thereon will become forfeited and void except as the right to a surrender value or paid-up policy, as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice." Laws 1892, c. 690, § 92. (*Record, pp. 47, 48.*)

The notice required by the New York statute was duly given by the Insurance Company more than fifteen and less than forty-five days prior to September 16, 1896, but no such notice was given within the corresponding period prior to the maturity of either of the notes, although the ordinary bank notice was given prior to the maturity of each of said notes. (*Record, p. 33.*)

The Insurance Company has never returned the note of March 16, 1897, but it did not appear on the trial that a

return had ever been demanded or that the Insurance Company had ever attempted to enforce it, or ever asserted any rights under it. The answer alleges that the Insurance Company retains it merely as evidence of the contract between the parties, and for its own protection (*Record, p. 18*).

Proofs of death were seasonably served upon the Insurance Company at its home office.

By stipulation of the parties, the printed record in the case of Conway v. Phœnix Mutual Life Insurance Co. (see *140 N. Y., p. 79*) together with the printed briefs of counsel in said Conway case, were made a part of the record in this case with the same force and effect as if they had been introduced and considered in evidence upon the trial, and it was further stipulated that they should be certified to this Court upon any writ of error which might be taken in the case. (*Record, pp. 113, 114.*)

At the close of plaintiff's testimony, the case was dismissed by the trial court, and thereupon a motion for a new trial was made and denied, and thereafter an appeal was taken to the Supreme Court of the State of Minnesota, which affirmed the decision of the trial court (*Record, pp. 48, 49 and 50*). Upon suggestion of plaintiff's counsel that the Supreme Court had not distinguished between the facts in the Conway case and those in the case at bar, a re-hearing was had in which the Supreme Court of Minnesota adhered to its former decision. (*Record, pp. 50, 51 and 52.*) (*See* 74 Minn. 387.)

General Propositions.

(1) This Court has no jurisdiction to review the judgment of the Supreme Court of Minnesota in this cause.

(2) The statute of the State of New York requiring a certain notice to be given by the insurer to the insured prior to the maturity of a premium had no application to the promissory notes given by the insured in this cause, but the terms of the notes themselves governed and defined the rights of the parties.

Argument.

I.

THIS COURT HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF MINNESOTA IN THIS CAUSE.

In order that this court should possess jurisdiction to review the judgment herein it must appear that the Supreme Court of Minnesota has failed to give that full faith and credit to the public acts, records and judicial proceedings of the State of New York which the Constitution requires.

We assert with the utmost confidence that such full faith and credit has been given by the Minnesota Court not only to the New York public act involved herein but to the records and judicial proceedings of that State. We have already discussed this question in our brief upon the formal motion to dismiss, and do not understand it is necessary to reprint that argument here, but assume that the Court will examine that brief should the hearing on the merits be first reached.

The situation here is fully covered by the decision of this court in *Glenn v. Garth, 147 U. S. 360,* where the Chief Justice says (*pp. 368-9*): "If every time the courts of a State put a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes invoked, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

See also Lloyd v. Matthews, 155 U. S. 222.

II.

THE STATUTE OF THE STATE OF NEW YORK REQUIRING A CERTAIN NOTICE TO BE GIVEN BY THE INSURER TO THE INSURED PRIOR TO THE MATURITY OF A PREMIUM HAD NO APPLICATION TO THE PROMISSORY NOTES GIVEN BY THE INSURED IN THIS CAUSE, BUT THE TERMS OF THE NOTES THEMSELVES GOVERNED AND DEFINED THE RIGHTS OF THE PARTIES.

In the Supreme Court of Minnesota the counsel for plaintiff-in-error not only argued the converse of the above proposition, but insisted that there had been a waiver of the forfeiture by the Insurance Company. This latter position is abandoned here however, as the assignments of error are all based on the alleged failure of the Minnesota Court to give full faith and credit to the New York statute and decisions, and the brief of the plaintiff-in-error does not allude to the question of waiver in any manner.

The one question, therefore, for this Court to pass upon (if it is decided that this cause is within its jurisdiction) is the applicability of the New York statute to the promissory notes given by the insured.

The policy requires the payment of the premium on September 16th in each year, with thirty days grace, and provides "If any premium is not paid on or before the day when due, this policy shall become void" (*Record, p. 22, fol. 46*). Therefore, it being conceded that the statutory notice had been properly given, if the insured had not paid the premium which fell due

September 16, 1896, within thirty days after that date, the policy would have become absolutely void.

See: *Joyce on Insurance, §§1103-1106 and cases cited, note 78.*
Fowler v. Insurance Co., 116 N. Y. 389.
Catoir v. Ins. & Trust Co., 33 N. J. L. 487.
Ashbrook v. Insurance Co., 94 Mo. 72.
Insurance Co. v. Ross, 159 Ill. 476, pp. 487-8.

The New York statute (*Laws 1892 c. 690, §92*) invoked by plaintiff-in-error, provides that no policy shall "be forfeited or lapsed by reason of non-payment when due of *any premium*, interest or installment or of any portion thereof *required by the terms of the policy to be paid*, unless a written or printed notice stating the amount of *such premium*, interest or installment or portion thereof *due on such policy*, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured or the assignee of the policy." (*Record, pp. 11 and 12.*)

As before stated, it is conceded that this statutory notice was seasonably given as to the premium falling due September 16, 1896 (*Record, p. 33*). Was it necessary to give a like notice prior to the maturity of the notes?

The statute, as it will be seen, only refers to *premiums* required by the terms of the policy to be paid, but the counsel for the plaintiff-in-error contends that the use of the words "interest or installment or portion thereof" of such premium makes it applicable to the notes, because, he argues, the notes are mere evidence of an unpaid portion of the premium. This is not only straining the language of the statute beyond any proper construction, but is in direct conflict with the terms of the receipt given by the Company, which provides that "said policy is in force until the 16th day of September, 1897," (which was the due date of the next annual premium), "*provided the above note is paid at maturity,*" (*Record, p. 46*). It is therefore plain that the cash payment and the giving of the first note was a conditional payment of the premium due September 16, 1896, and continued the policy in force for another year, but the life of the policy depended upon the carrying out of the new contract which was then entered into; and the rights of the parties thereafter rested upon the observance by both of them of the terms of this new contract. What was the new contract which the insured and the insurer entered into, the consideration for which was the extension of the time for payment of a part of the amount which the insured should have paid within thirty days after September 16, 1896? It is plain and unequivocal. It consists of a promissory note made and signed by the insured, which reads as follows:

"Pol. 692,465. St. Paul, Minn., 9-16-1896.

Without grace six months after date I promise to pay to the order of the New York Life Insurance Company, eight hundred and sixty dollars, at Second

National Bank, St. Paul, Minn., value received, with interest at the rate of 5 per cent. per annum.

This note is given in part payment of the premium due 9-16-'96 on the above policy with the understanding that all claims as to further insurance and all benefits whatever which full payment in cash of said premium would have secured shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself.

No. 43205. Int. 21.50. $860. William Banholzer."
March 16, '97.

and a cotemporaneous receipt signed by the Company's cashier, reading as follows:

"New York Life Insurance Company, 346-348 Broadway, New York.
Cash, $286.
St. Paul, Minn., 10-6-'96.

Note 6 mos., dated 9-16-'96, due 3-16-'97 without grace.
Made by Wm. Banholzer.
Payable at Second National Bank, St. Paul, Minn

Received from the owner of policy No. 692,465, $286 in cash and his note at six months for $860, which continues said policy in force until the 16th day of Sept., 1897, at noon, in accordance with its terms and conditions, provided the above note is paid at maturity, and this receipt signed by

J. A. Campbell, Cashier."

The insured knew then that unless he paid his note in six months after this date, according to its terms, "*all claims as to further insurance and all benefits whatever which full payment in cash of said premium would have secured, shall immediately become void and be forfeited to the New York Life Insurance Company * * * except as otherwise provided in the policy itself.*" (This exception refers to the non-forfeitable provisions of the policy which in this case had not taken effect. *Record p. 23, fol. 48.*)

The note given on March 16, 1897, (which was never paid) in renewal of a part of the note above quoted, was exactly similar in terms, excepting that it was payable in two months (*Record, p. 16*).

A careful consideration of the language of the statute shows that it can have no reference whatever to notes which may be given subsequent to the maturity of the premium, by which the insured is allowed some favor as to the time or the manner in which his indebtednes to the insurer shall be paid. The express language of the statute precludes any such construction. The notice to be given must state "*the amount of such premium*, interest or installment or portion thereof *due on such policy*," and it is to be addressed and mailed to *the person whose life is insured, or the assignee of the policy*. Suppose the note which the insurer had taken in settlement of the premium had been the note of some one other than the insured, but containing the same clause as to forfeiture of the policy if it were not paid at maturity. Could it be argued that the insured would have to give the statutory notice prior to the maturity of the note to the maker thereof who might not be the insured and

who might not communicate the fact that he had received such notice to the insured? Or to suppose a more extreme case, which we suggested to the Minnesota Court and which is embodied in its opinion, where the policy allowed no grace, and the insured asked for an extension of only ten days for the payment of his premium, and gave his note with conditions similar to those in the notes in question, would it be argued that the insurer was obliged to give the statutory notice of at least fifteen days five days prior to the date of the making of the note, and at a time when the insurer did not know that any such note would be made? This and other supposable cases show conclusively that it was not the intention of the framers of the statute that the notice required should be given in the case of a promissory note, but only as to premiums falling due.

The use of the words "interest or installment, or portion thereof," is intended evidently to cover the very common case by which, although the policy requires the payment of an annual premium, an arrangement is subsequently made by which this annual premium is divided into quarterly or semi-annual installments.

See *DeFrece v. Ins. Co., 136 N. Y. 144.*

The reason for requiring this statutory notice as to premiums has no existence in the case of promissory notes. In many insurance policies, the amount to be paid upon a premium day is not ascertainable by reference to the policy, as it may be varied by dividends earned, or by other causes. The amount is always fixed and known in the case of a note. The place at which a premium is to be paid is often changed, and the person or officer to whom it is payable, and the statute properly requires that the notice shall state where it is to be paid, and the person to whom it is to be paid. In the case of a note, these uncertainties cannot occur. Then too, the insurance policy usually runs for so long a time that the insured may forget the exact day upon which the premium falls due, and hence he is protected by the statutory notice. In the case of a note, which is invariably for a short period, no such considerations apply; and as notes are usually payable at a bank, the custom of banks to give notice of the maturity of notes (as was done here) constitutes a sufficient protection to the maker.

All these reasons for the non-applicability of the statutory notice to the notes given by the insured were carefully considered by the Supereme Court of Minnesota, and in rendering its decision upon the re-argument of the case, the following language was used (Mitchell, J.):

"We shall not decide that question, as we are satisfied that if the construction of the New York statute is to be considered as *res integra*, the notice required by it was not applicable to the notes given by Banholzer for part of the September

premium. The statute was no doubt enacted for the benefit of the insured, recognizing the fact that they were very often people who were neither experts nor systematic in business matters, and therefore liable to overlook or forget the due days of their premiums according to the terms of their policies, issued perhaps years before, laid away and seldom examined or referred to; and while courts are usually liberal in protecting the assured against forfeitures, this is always done in the interest of justice and is no reason why any strained or forced construction should be placed upon this statute which would be unreasonable or operate oppressively upon the insurers or which was not within the legislative intent.

"The premiums on life insurance policies are always payable at stated periods specified in the policy once for all during its life. They are usually payable yearly, sometimes every six months, and occasionally quarter-yearly. It seems to us that it was these periodical due days, as fixed by the policy itself, which the legislature had in mind and to which the statute refers, and not to an extension of time for the payment of a particular premium after it has become due according to the terms of the policy. These extensions are usually and probably always granted at the instance and for the accommodation of the insured. They are always the result of a special and express agreement, which brings the whole matter presently to the mind of the insured. They are necessarily for a for a comparatively short time.

"They are not therefore within the mischief of this statute; at least, not to any considerable extent. The language of the statute is not very apt, if it was designed to include them, and in practice it would often be impracticable, if not impossible, to apply its provisions to such temporary and special extensions. To do so would often produce some very unreasonable results. For example, if the extension was for only fifteen days the insurer would have to give the insured notice of the date when the extension would expire on the very day it was granted. Every extension, although in terms only for one day or for five days, would in effect amount to an extension for at least fifteen days. It can make no difference in principle whether the extension was for two days or two months, or whether a time note was taken for the overdue premium or the extension granted in some other way. For these reasons, the opinion heretofore filed is adhered to." (*Record, pp. 51, 52.*)

But independent of the conclusions of the Supreme Court of Minnesota we have a decision of the Court of Appeals of New York, passing on its own statute, which is exactly in point, and which we submit is binding upon this court.

See *Conway v. Insurance Co., 140 N. Y. 79.*

The Conway case was an action upon a policy of insurance issued by the Phœnix Mutual Life Insurance Company upon the life of William F. Conway, the plaintiffs' intestate. The policy was payable to his legal representatives upon his death, or at the end of twenty years to him if then living. By its terms, if default should occur in the payment of any premium, after three or more years' premiums should have been paid upon it, the Company was to become liable for a sum of paid-up insurance, to be paid at the death of the insured or at the due date of the policy, equal to as many twentieths of the amount of the policy as there should have been paid full years' premiums thereon. The policy also contained a provision "that if any subsequent premium hereon be not paid when due, and a separate receipt signed by the president or secretary of this company, in each case given therefor, then this policy shall cease." It also contained a declaration that "no agent or other person can alter, modify or waive any of the terms or conditions of this policy." (*Record, pp. 59, 60.*) Four full

years premiums upon his policy were paid by the insured and in each case he received a renewal receipt which contained a notice that "no agent is authorized in any case to waive or postpone payment of premium or to accept it after the date at which it falls due without special permission from the president or secretary of the company." (*Record, p. 69.*) When the fifth year's premium fell due, October 24th, 1891, the insured failed to pay it, but gave to the general agents of the company a note for its amount, due in six months—this was a plain promissory note without any forfeiture clause attached (*Record, p. 69*)—which they accepted, witholding the renewal receipt. The renewal receipt (which was prepared at the company's home office, sent to the general agents, and was by them, in case of default, to be returned to the home office at such time thereafter as they were notified so to do) was held by the agents in their own hands until after the death of the insured. During all this time the company did not demand the return of the receipt. In the meantime it had ample opportunity by means of the monthly reports of its agents to inform itself of the fact that the premium had not been paid. A few days prior to the maturity of his note, the insured wrote the company's agent, stating his inability to pay it, when due, and asking its renewal for three months. To this letter the agents, who had already placed the note in bank for collection, replied (April 19, 1892,) that *they did not feel at liberty to accept a note extending the time of payment of insured's renewal any further*, but that they would recall the note from the bank *and hold the "renewal"* (receipt) *at their office as long as possible; that they might be required any day to return it to the home office for cancellation.* (*Record, p. 66.*) The note was recalled from the bank and held by the agent until after the death of the insured, no payment of, or upon, it having been made. It was customary for the agents to accept payment of premiums after due and the company had knowledge of, and had at least impliedly authorized, this custom. More than thirty and less than sixty days prior to the due date of the premium, *i. e.*, on August 31st, 1891, the company gave to the insured the premium notice required by the N. Y. statute. No other notice was ever given. The plaintiff sought to recover the full amount of the policy less the amount of the note with interest. The defendant offered judgment for $1,000 being $\frac{1}{20}$ of the amount of the policy. In her complaint, the plaintiff, the administratrix of the insured, set out, among other things, that "*the defendant never served the notice required by the statute, within the time required by the statute, that said policy would lapse or be forfeited in case of the failure of the assured to pay the premium due by the terms of the note, April 27th, 1892*" (*Record, p. 58*). This allegation was admitted by the

answer, although the answer set out the notice given August 31, 1891, and defendant, upon trial, proved that this last mentioned notice had been duly given. The trial court directed a verdict for the amount claimed and judgment having been entered upon the verdict, it was affirmed at the general term.

Upon appeal the company claimed, (1) that forfeiture resulted immediately upon the failure of the insured to pay his premium upon its due date; and (2) if the acceptance of his note amounted to an extension, forfeiture resulted immediately upon default in payment of the note, April 27, 1892. (*Record, pp. 99, 101.*) Its counsel argued that the company's agents had no authority to extend the time for the payment of a premium; that the company itself had no knowledge of the granting of any extension; that if the acceptance of the note amounted to an extension, the agent had no authority to extend the time for the payment of the note and that they had in fact refused even to attempt to grant any extension of the time for its payment.

Plaintiff's counsel claimed (1) that the acceptance of the note constituted an extension of the time for the payment of the premiums; (2) That the letter written by the agents to the insured constituted an extension of the time for payment of the note until some date after notice to pay; and (3) that *no forfeiture could occur unless the premium notice required by statute was given in anticipation of, or subsequent to, the maturity of the note.*

Counsel for appellant (the company) in this Conway case, preparing their brief, of course, in ignorance of exactly what the brief of respondent would contain, anticipated that some claim would be made by respondent's counsel that the provisions of the statute with reference to premium notices had not been complied with, and devoted more than two pages of their brief to showing that the defendant had fully complied with the statute and concluded their argument upon this phase of the case with these words: "The notice required having been given, the effect of non-payment is precisely the same as it would have been before the statute, and the question as to waiver or forfeiture is governed by establishing principles, irrespective of the statute." (*Record, pp. 97-99.*)

When plaintiff's brief was filed, the contention of counsel in this respect became plain. Subdivision V reads as follows: (After arguing that the agents had authority to extend the time for payment of the note) "*Moreover, accepting the note extended the time of payment of the premium, so that the premium did not become due until the note matured, which was six months from October. This made the notice served by company August 31, 1891, of no avail. The premium became due when the note matured, and the company failed to serve*

any notice either before or after the note matured, within the time required by statute. Laws of 1877, Chap. 321. (Record, p. 110.)

Plaintiff's counsel did not at any time claim that if forfeiture had occurred by reason of non-payment of the premium upon the premium day, any notice other than that actually given was necessary.

In deciding the case, New York Court of Appeals discusses the questions involved with reference to the argument of plaintiff's counsel. It first takes up the question of the authority possessed by the general agents of the Company, and negativing the contention of the plaintiff that their power was less subject to limitation than that of ordinary agents, holds that their authority was primarily limited by the very strict terms of the policy; that the insured was chargeable with knowledge of the limitations so imposed; that his right to believe that these limitations had been removed, to any extent, was confined to such inferences as might reasonably be drawn from methods of business which had acquired the force of consent by reason of their public and continuous nature, or from some particular course of dealing in his own case. The court then discusses the evidence bearing upon the point of the agents authority, so far as it tends to establish a custom of business, declaring that there was no evidence in the case that the company ever knew that their agents had taken a note for a premium, but holding that the company had sanctioned the custom of the agents to accept payment of overdue premiums, limiting their authority so to do, however, to cases of policy-holders in good health. The court then expresses the opinion that the insured was entitled to the benefit of this general custom as so limited.

It then proceeds to state what, with reference to this point is "fairly inferable" from the evidence discussed. This is, in effect, that the agents were at liberty to accept payment of a premium tendered by the insured after the same became due, provided no alteration in his health had occurred in the meantime. The court excludes from its statement of what is "fairly inferable" the conclusion that the agents were at liberty to extend the time for payment to a date in the future. It then states *the effect* of an arrangement such as the agents were thus authorized to make, viz., that upon failure of the insured, after notice, to pay his premium upon its due date, the risk that pending the delay he might change in health or die, was upon him. (*140 N. Y. 85.*)

Then after discussing some other questions involved the Court is brought to the contention of the plaintiff that the acceptance of the note had nullified the effect of the original premium notice, and that a new premium notice subsequent to

the maturity of the note was required by the statute, and it disposes of that proposition as follows:

"No further notice was required from the company to the deceased. The notice provided to be given by the statute as a condition of its right to declare a policy lapsed for non-payment of an annual premium, was not necessary, inasmuch as it had duly given the notice before the premium became due which the statute has provided for. The statute does not apply to this case. Chap. 341, Laws 1876, and Chap. 321, Laws 1877." (*140 N. Y. 86.*)

See also *Holly vs. Insurance Co., 105 N. Y. 437.*

We have carefully analyzed the Conway case because the counsel for the plaintiff-in-error insisted in the Minnesota Court, and makes the same contention here, that the New York Court of Appeals in deciding that case, did not decide that the statutory notice was not necessary in the case of a promissory note given in settlement of a premium. It seems to us that no fair construction of the points raised by the parties in the Conway case, and of the language of the Court in deciding it, can reach any other conclusion than that the exact point which is here for decision was fully considered and decided by that court.

What possible object could there have been in the use of the language, *"No further notice was required from the company to the deceased. The notice provided to be given by the statute as a condition of its right to declare a policy lapsed for non-payment of an annual premium was not necessary, inasmuch as it had duly given the notice before the premium became due, which the statute has provided for. The statute does not apply to this case.* (*Chap. 341, Laws 1876, and Chap. 321, Laws 1877,*)" if it were not intended by that court to decide that the statutory notice had no application to a promissory note.

But counsel for plaintiff-in-error, in order to avoid the effect of the decision in the Conway case, raises the point that there is a distinction between the New York statute of 1877, which was passed upon in that case, and the statute of 1892 which affects the case at bar, and he sets out in parallel columns on page 13 of his brief, the two acts, in order to show this alleged distinction. We repeat them here:

1892.	1877.
Nor shall any such policy be forfeited or lapsed by reason of non-payment, when due, of any premium, interest or installment, or of any portion thereof required by the terms of the policy to be paid, unless, etc.	No life insurance company shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of any annual premium, or interest, or any portion thereof, except, etc.

It is a mere splitting of hairs to say that the statute of 1892 imposes upon the insurer any different obligations, and

particularly any new obligations, as to promissory notes, than the statute of 1877. And even the ingenious imagination of the counsel for the plaintiff in error does not in any reasonable sense suggest a difference.

This suggested difference was urged in the Supreme Court of Minnesota, and was disposed of by that Court as follows:

"*The statute under consideration in the former was Laws (N. Y.) 1876, c. 341, as amended by Laws 1877, c. 321; the statute applicable to the present case is Laws (N. Y.) 1892, c. 690, § 92. This last act appears to be a compilation and revision of all the insurance laws of the state, and section 92 thereof is but an embodiment (with certain amendments) of the provisions of the act of 1876 as amended in 1877. We have compared the language of the two acts, and are unable to discover any difference between them that at all affects the question now under consideration.*"

Banholzer v. N. Y. Life Ins. Co., 74 Minn., p. 397.

We insist, therefore, that even if this Court is of the opinion that it has jurisdiction of the case, the decision must be the same as that of the New York Court of Appeals in the Conway case, and as that of the Minnesota courts, both on the trial and upon the two hearings had before the Supreme Court of that state; and hence that the judgment of the Minnesota Court must be affirmed.

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